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No. 83-461

In the Supreme Court of the United States

OCTOBER TERM, 1984

CLUB MEDITERRANEE, S.A., APPELLANT
v.
MARJORIE SCHLOSSBERG DORIN AND
PHILIP DORIN

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a state court in a private civil action violates the Supremacy Clause by ordering a party to answer interrogatories pursuant to state law, rather than utilizing the procedures authorized by the Hague Evidence Convention, where the party asserts that the information necessary to answer the interrogatories is available only in the territory of a foreign state that is a party to the Convention.

2. Where compliance with such interrogatories would assertedly require a party to the action to violate the laws of the foreign state, while the information sought might be provided by the party without violating the foreign state's laws if obtained through procedures authorized by the Evidence Convention, whether a state court is required as a matter of international comity to attempt in the first instance to obtain the information through the procedures authorized by the Convention.

TABLE OF CONTENTS

Page

Statement 1

Discussion 3

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 14

Charleston Federal Savings & Loan Ass'n v. *Alderson*, 324 U.S. 182 4

Cohen v. *California*, 403 U.S. 15 4

Graco, Inc. v. *Kremlin, Inc.*, 101 F.R.D. 503 13

Grand Jury Proceedings, In re, 691 F.2d 1384, cert. denied, No. 82-1531 (June 13, 1983) 14

Griffiths, In re, 413 U.S. 717 4

Hanson v. *Denckla*, 357 U.S. 235 4

Hilton v. *Guyot*, 159 U.S. 113 10

Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 4

Laker Airways, Ltd. v. *Sabena, Belgian World Airlines*, 731 F.2d 909 10

Lasky v. *Continental Products Corp.*, 569 F. Supp. 1227 13

Marc Rich & Co., A.G. v. *United States*, 707 F.2d 663, cert. denied, No. 82-2011 (June 27, 1983) 14

Page

Cases—Continued:

Mayer v. *City of Chicago*, 404 U.S. 189 4

Philadelphia Gear Corp. v. *American Pfauter Corp.*, 100 F.R.D. 58 13

Pierburg GmbH & Co. v. *Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 13

Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 4

Schroeder v. *Lufthansa German Airlines*, 18 Av. Cas. (CCH) 17,222 (N.D. Ill. Sept. 15, 1983) 13

Societe Internationale v. *Rogers*, 357 U.S. 197 10

Sumitomo Shoji America, Inc. v. *Avagliano*, 457 U.S. 176 6

United States v. *First National Bank*, 699 F.2d 341 10

United States v. *First National City Bank*, 396 F.2d 897 ..... 6, 10

United States v. *Vetco, Inc.*, 691 F.2d 1281, cert. denied, 454 U.S. 1098 ..... 10, 14

Uranium Antitrust Litigation, In re, 480 F. Supp. 1138 6

Volkswagenwerk, A.G. v. *Superior Court*, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 ..... 6, 13

Zschernig v. *Miller*, 389 U.S. 429 14

Page

Constitution, treaties, statutes and rules:

U.S. Const. Art. VI, Cl. 2 (Supremacy Clause) 1, 2

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 7

Art. 1 7

Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 ..... *passim*

Arts. 1-14 5

Art. 3 6

Arts. 15-16 5

Art. 17 5

Art. 23 8

28 U.S.C. 1257(1) 4

28 U.S.C. 1257(2) 4

28 U.S.C. 1257(3) 4

28 U.S.C. 2103 4

French Penal Code Law No. 80-538 of July 16, 1980, Art. 1 *bis* 2

Fed. R. Civ. P. 28(b) 5

N.Y. Civ. Prac. R. 3134(a) (McKinney 1970) 2

Page

Miscellaneous:

Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in Message from the President Transmitting the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,* S. Exec. A, 92d Cong., 2d Sess. (1972) 5-6

Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters,* 18 Int'l & Comp. L.Q. 646 (1969) 4, 5

Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention,* 37 U. Miami L. Rev. 733 (1983) 7, 8, 9, 13, 14

Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law, 8 Int'l Legal Materials 785 (1969) 5

Restatement (Revised) of Foreign Relations Law of the United States (Tent. Draft No. 3, 1982) 11

Restatement (Second) of Foreign Relations Law of the United States (1965) 10

S. Exec. A, 92d Cong., 2d Sess. (1972) 6, 8

S. Exec. Rep. 92-25, 92d Cong., 2d Sess. (1972) 5, 7

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

In this personal injury action, a New York trial court has entered an order requiring appellant Club Mediterranee, S.A. (Club Med) to answer interrogatories propounded by appellees. The questions on this appeal are (1) whether such an order is invalid under the Supremacy Clause (U.S. Const. Art. VI, Cl. 2) and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, entered into force for the United States on October 7, 1972, and for France on October 8, 1974

[hereinafter cited as Evidence Convention], set forth at J.S. App. 19a-79a; and (2) whether such an order is invalid under principles of international comity.

Appellees filed this action in the Supreme Court of the State of New York against Club Med, a French corporation, for injuries allegedly sustained by appellee Marjorie Dorin while a guest at a Club Med resort in Haiti from December 1981 to January 1982 (J.S. 5-6). Pursuant to New York law,[1] counsel for the Dorins served interrogatories on Club Med's counsel (J.S. App. 97a-101a).[2] Club Med moved to strike the interrogatories on the grounds, inter alia, that they violated the Supremacy Clause and the Evidence Convention and were invalid under principles of international comity (Appellant's Reply Br. 1a-9a). Club Med asserted, in this regard, that the information necessary to respond to the interrogatories was available only in France and that answering the interrogatories would violate a French penal statute.[3] The court struck four interrogatories on other grounds (J.S. App. 5a), but rejected Club

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[1]Under New York law,

> [i]nterrogatories shall be answered in writing under oath by the party upon whom served, if an individual, or, if the party served is a corporation, a partnership, or a sole proprietorship, by any officer, director, agent or employee having the information.

N.Y. Civ. Prac. R. 3134(a) (McKinney 1970).

[2]The interrogatories seek information concerning (1) Club Med's relationship with the facility in Haiti, including all documents that describe that relationship; (2) construction of the Club Med facility in Haiti; (3) the existence of an operational manual for the facility; (4) whether employees are required to take appropriate shots for typhoid fever and malaria; (5) whether the Haiti facility's sanitation, food storage and preparation, and water systems have been inspected, and the results of such inspections; (6) management and medical personnel at the Haiti facility (J.S. App. 97a-101a).

[3]The French statute cited by Club Med, Law No. 80-538 of July 16, 1980, Art. 1 *bis*, is set forth at page 12, *infra*.

Med's arguments based on the Evidence Convention, stating that "the Hague Convention proscribes the taking of evidence * * * only in *French Territory*" (J.S. App. 6a; emphasis in original).

Club Med appealed the trial court's order compelling it to respond to the interrogatories. The Appellate Division affirmed without opinion (J.S. App. 1a-2a), and denied leave to appeal to the New York Court of Appeals (J.S. App. 3a-4a).[4]

DISCUSSION

This case presents important questions concerning the proper procedures to be followed by United States courts in ordering discovery where the party from whom discovery is sought claims that the information necessary to respond to the discovery request is located in a foreign state that is a party to the Hague Evidence Convention. The questions presented are whether the procedures specified in the Convention are exclusive and, if not, whether principles of international comity nevertheless require that the Convention's procedures be exhausted before the court may resort to traditional state and federal discovery devices.

It is our position that the Evidence Convention is not exclusive and that therefore the order of the New York trial court does not conflict with any treaty obligations of the United States under the Convention. With respect to the comity issue, we submit that the determination whether the Evidence Convention's procedures should be employed in the first instance depends on the facts and circumstances of each case. As we explain below, because the state trial court did not undertake a balancing of the relevant interests necessary to a proper comity analysis, this case does not

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[4]The Chief Justice subsequently stayed the trial court's order pending this Court's consideration of the instant appeal (J.S. App. 17a).

provide this Court with an adequate record on which to decide the comity issue. Accordingly, we do not believe that the comity issue warrants review by this Court at the present time.[5]

1. a. The Evidence Convention provides methods for United States courts and litigants to obtain evidence abroad. Most civil law countries, including France, provide much less freedom to litigants in the collection of evidence for use in foreign proceedings than do the United States and, to a lesser extent, other common law countries. Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters,* 18 Int'l & Comp. L.Q. 646, 647 (1969). This is because civil law countries regard the taking of evidence as a judicial function rather than as an act of the parties; when evidence is taken without the participation or consent of officials of the host country, the host country may consider

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[5]We note that this Court appears to lack jurisdiction over this case except by way of certiorari under 28 U.S.C 1257(3), as requested in the alternative by appellant pursuant to 28 U.S.C. 2103 (see J.S. 22). Appellate jurisdiction under 28 U.S.C. 1257(1) clearly is not appropriate here, because the state courts have issued no decision in this case against the validity of a treaty. Similarly, jurisdiction by way of appeal under 28 U.S.C. 1257(2) also is unavailable. The record, as reflected in the papers filed in this Court, does not reveal that appellant explicitly challenged the validity of the New York statute as applied, but rather shows that appellant attacked the particular actions of the trial court as invalid on federal grounds. There is therefore no jurisdiction under 28 U.S.C. 1257(2). See *Richmond Newspapers, Inc.* v. *Virginia,* 448 U.S. 555, 562-563 n.4 (1980) (plurality opinion); *Hanson* v. *Denckla,* 357 U.S. 235, 244 & n.4 (1958); *Charleston Federal Savings & Loan Ass'n* v. *Alderson,* 324 U.S. 182, 185-187 (1945). This case, like virtually every case, involves judicial actions taken pursuant to procedures established by statute or rule. No distinction in the statute itself is challenged, as in *Mayer* v. *City of Chicago,* 404 U.S. 189 (1971), and *In re Griffiths,* 413 U.S. 717, 718 (1973), and no assertedly unconstitutional application of a substantive state statute is involved, as in *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 440-441 (1979), and *Cohen* v. *California,* 403 U.S. 15, 17-18 (1971).

that its "judicial sovereignty" has been violated. See *ibid.; Report of United States Delegation to the Eleventh Session of the Hague Conference on Private International Law*, 8 Int'l Legal Materials 785, 804, 806 (1969). Prior to the Convention, courts and litigants frequently encountered problems in obtaining evidence abroad from countries with different legal systems. See S. Exec. Rep. 92-25, 92d Cong., 2d Sess. 1 (1972). The Convention was designed to minimize such difficulties in the future by establishing "greater flexibility in the means available for obtaining evidence abroad." *Id.* at 4.

The Evidence Convention provides for three alternative methods of conducting evidence taking proceedings abroad in connection with civil or commercial litigation in United States courts: (1) a letter rogatory (called in the English text of the Convention a "letter of request") transmitted through a foreign "Central Authority" to a foreign court, which conducts the proceeding (Arts. 1-14); (2) notice to appear before an American diplomat or consular officer (Arts. 15-16); and (3) designation of a private commissioner to take evidence (Art. 17). The three methods correspond to those provided for by Fed. R. Civ. P. 28(b).[6] As the Report on the Convention states, the basic principle underlying the Convention is that "[a]ny system of obtaining evidence or securing the performance of other judicial acts internationally must be 'tolerable' in the State of execution and must also be 'utilizable' in the forum of the State of origin where the action is pending." Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in Message from the President Transmitting the Convention on the Taking of*

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[6]Because the second and third methods do not involve proceedings before a judge of the host country, they are subject to strict limitations in the Convention. See S. Exec. Rep. 92-25, *supra*, at 4-5.

Evidence Abroad in Civil or Commercial Matters, S. Exec. A, 92d Cong., 2d Sess. 11 (1972).

The Convention itself does not contain a definition of the term "obtain evidence." However, some guidance to the meaning of that term is provided by the language of the Convention. Subsections (e), (f) and (g) of Article 3 show that a letter of request "may be used to 'examine' persons and to put 'questions' to them, or to secure the 'inspection' of 'documents or other property, real or personal.' " S. Exec. A, *supra,* at 13. For purposes of this case, we assume that the Convention procedures may be used to obtain answers to interrogatories such as those propounded by appellees.

b. Traditionally, United States courts have held that if they have jurisdiction over a foreign party or witness, they may require that party or witness to comply with a discovery request under pain of sanctions. See, *e.g., United States* v. *First National City Bank,* 396 F.2d 897, 900-901 (2d Cir. 1968); *Volkswagenwerk, A.G.* v. *Superior Court* 123 Cal. App.3d 840, 856-857, 176 Cal. Rptr. 874, 883-884 (1981); *In re Uranium Antitrust Litigation,* 480 F. Supp. 1138, 1144 (N.D. Ill. 1979). Of course, whether and at what point the court should exercise this authority in a given case depends on a number of factors, which we will address below in our discussion of the comity issue. The initial question, however, is whether the Evidence Convention supersedes state and federal discovery procedures. This question is one of federal law to be determined by the intent of the parties to the treaty, and the starting point for analysis is the language of the treaty itself. See *Sumitomo Shoji America, Inc.* v. *Avagliano,* 457 U.S. 176, 180 (1982).

Unlike the Hague Service Convention,[7] which was concluded several years earlier and which expressly provides that it is exclusive,[8] the Evidence Convention contains no express provision for exclusivity. In addition, as one commentator has noted, "extraterritorial discovery has been a standard practice of American courts for some time," and there is "no evidence that the American negotiators, the Department of State, or the Congress intended to prohibit this practice entirely." Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention,* 37 U. Miami L. Rev. 733, 760 (1983). On the contrary, the Senate Report emphasized that the Convention was intended to improve the means for securing evidence abroad. See S. Exec. Rep. 92-25, *supra,* at 1, 3. The Senate Report quoted the following statement in support of ratification made by Philip Amram, United States representative to the commission that drafted the Convention and rapporteur of the commission (S. Exec. Rep. 92-25, *supra,* at 5):

> [The Convention] makes no major changes in United States procedure and requires no major changes in United States legislation or rules. On the other front, it will give United States courts and litigants abroad enormous aid by providing an international agreement for the taking of testimony, the absence of which has created barriers to our courts and litigants.

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[7]Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, entered into force for the United States, February 10, 1969.

[8]Article 1 of the Service Convention (20 U.S.T. at 362) provides: "The present Convention shall apply in all cases in civil or commercial matters where there is occasion to transmit a judicial or extrajudicial document for service abroad."

See also S. Exec. A, *supra,* at XI ("A significant aspect of the Evidence Convention is the fact that although it requires little change in the present procedures in the United States it promotes changes, in the direction of modern and efficient procedures, in the present practices of many other states."). "Absent an express provision in the treaty that a longstanding practice valued by at least some members of the American bar was being abolished — a factor that could indeed have affected the United States decision to ratify the convention — it is unreasonable to conclude that the convention implies such a prohibition." Oxman, *supra,* 37 U. Miami L. Rev. at 760.

Although most of the reported decisions require resort to the Evidence Convention as a matter of international comity (see pages 12-13, *infra*), none holds that the Convention is exclusive and therefore supersedes traditional discovery methods. The consequences of such a holding would be adverse to United States interests. It would give foreign signatory states the final say in determining the extent of extraterritorial discovery to be permitted in American courts. As a result, litigants in United States courts might find it impossible to obtain necessary discovery from foreign based parties. The problems engendered by a holding of exclusivity are underscored by the fact that most of the signatory states, including France, have exercised their right under Article 23 of the Evidence Convention not to obligate themselves to honor requests for pretrial discovery of documents.[9] While the precise import of Article 23 is highly uncertain (see Oxman, *supra,* 37 U. Miami L. Rev. at 771-779), it is our view that the Convention cannot be

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[9]Article 23 provides that a contracting state may "declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries" (J.S. App. 28a).

construed as absolutely restricting the authority of United States courts to employ traditional discovery devices specified in federal and state rules.[10] Accordingly, we submit that the order of the New York court requiring Club Med to respond to interrogatories does not violate the international law obligations of the United States under the Evidence Convention.

2. The question remains whether, as a matter of comity, United States courts should be required to exhaust the procedures of the Evidence Convention before resorting to more traditional means of discovery that may offend the foreign government.

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[10]We recognize that in our brief in *Volkswagenwerk, A.G.* v. *Falzon*, No. 82-1888 (at 6), we stated:

> The parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted. The Convention accordingly must be interpreted to preclude an evidence taking proceeding in the territory of a foreign state party if the Convention does not authorize it and the host country does not otherwise permit it.

After further reflection, we believe that that statement requires clarification to the extent that it could be construed to mean that the Convention is exclusive.

We note that the above statement was not necessary to our argument that the trial court's order in *Falzon* was unlawful. The trial court in *Falzon* ordered that employees of a foreign corporation be deposed in Germany before an American consular officer. Under established principles of both domestic and international law, however, American courts are precluded from ordering anyone to participate in discovery proceedings in the territory of a foreign state absent that state's consent, wholly independent of the Evidence Convention. See Oxman, *supra*, 37 U. Miami L. Rev. at 751. Because Germany's consent to such discovery was limited to means authorized by the Convention, the court in *Falzon* could order such proceedings in Germany only if authorized by the Convention.

a. It is well settled that United States courts should refrain, if possible, from ordering a person to perform an act that would violate the laws or clearly articulated policies of a foreign government.

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. *Guyot*, 159 U.S. 113, 163-164 (1895). See *Laker Airways, Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984); *United States* v. *First National Bank*, 699 F.2d 341, 345-347 (7th Cir. 1983); *United States* v. *Vetco, Inc.*, 691 F.2d 1281, 1288-1291 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *United States* v. *First National City Bank*, 396 F.2d at 901-905. Cf. *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958).

In undertaking a comity analysis, the courts must balance the competing factors involved. Some of those factors are set forth in the Restatement (Second) of Foreign Relations Law of the United States § 40 (1965), which provides:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,

(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

(c) the extent to which the required conduct is to take place in the territory of the other state,

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[11]

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[11]See also Restatement (Revised) of Foreign Relations Law of the United States § 420 (Tent. Draft No. 3, 1982):

Requests for Disclosure and Foreign Government Compulsion.

(1)(a) Where authorized by statute or rule of court, a court in the United States may order a person before the court to produce documents or other information directly relevant, necessary, and material to an action or investigation, even if the information or the person in possession of the information is located outside the United States.

(b) Failure to comply with an order to produce information may subject the person to whom the order is directed to sanctions, including contempt or dismissal of a claim or defense, or to a finding by the court that the facts to which the order was addressed are as asserted by the opposing party.

(c) In issuing an order directing production of documents or other information located abroad, a court in the United States must take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; in which of the states involved the documents or information originated; the extent to which compliance with the request would undermine important interests of the state where the information is located; and the possibility of alternative means of securing the information.

(2) If disclosure of information located outside the United States is prohibited by a law or regulation of the state in which the information or prospective witness is located, or by the state of nationality of the prospective witness,

b. The state court's discovery order in this case implicates principles of comity because if Club Med responds to the interrogatories it could be in violation of the French blocking statute. That statute provides (J.S. App. 89a):

> Art. 1 *bis*. Subject to treaties or international agreements and to the laws and regulations in force, every person is forbidden to request, to seek or to communicate, in writing, orally or in any other manner, documents or information of an economic, commercial, industrial, financial or technical nature intended to serve as evidence in foreign judicial or administrative proceedings or within the scope of the latter.

The blocking statute is apparently intended to ensure that United States litigants seeking to obtain evidence located in France will resort to the procedures authorized by the Evidence Convention (see J.S. App. 93a-96a).

To the extent that the discovery order involved here conflicts with the French blocking statute, that conflict could be resolved by requiring the use of the Evidence Convention procedures. Indeed, we note in this regard that a number of courts have held that principles of international comity require resort to the Convention procedures

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(a) the person to whom the order is directed may be required by the court to make a good faith effort to secure permission from the foreign authorities to make the information available;

(b) the court may not ordinarily impose the sanction of contempt, dismissal, or default on the party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a);

(c) the court may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful.

where traditional state or federal discovery procedures are found to conflict with the laws or policies of the foreign country where the evidence is located. See, *e.g., Pierburg GmbH & Co.* v. *Superior Court,* 137 Cal. App. 3d 238, 245, 186 Cal. Rptr. 876, 881 (1982); *Volkswagenwerk, A.G.* v. *Superior Court,* 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981); *Philadelphia Gear Corp.* v. *American Pfauter Corp.,* 100 F.R.D. 58 (E.D. Pa. 1983); *Schroeder* v. *Lufthansa German Airlines,* 18 Av. Cas. (CCH) 17,222 (N.D. Ill. Sept. 15, 1983). But see, *e.g., Graco, Inc.* v. *Kremlin, Inc.,* 101 F.R.D. 503 (N.D. Ill. 1984); *Lasky* v. *Continental Products Corp.,* 569 F. Supp. 1227 (E.D. Pa. 1983). It is our position that, in appropriate cases, United States courts should utilize the procedures established in the Evidence Convention in order to avoid international friction arising from the enforcement of extraterritorial discovery orders. Thus, where a trial court determines that a conflict between a foreign blocking statute and state or federal discovery rules cannot be reconciled in a given case other than through resort to the Evidence Convention, the court, as part of a proper comity analysis, should consider whether to require the litigants to proceed in conformity with the Convention. See Oxman, *supra*, 37 U. Miami L. Rev. at 779-783. If the court does so require and the evidence is not forthcoming after resort to the Convention's procedures, the court would retain the authority to order the litigant from whom discovery is sought, upon pain of sanctions, to produce the evidence located abroad.

c. Whether this is an appropriate case for requiring utilization of the Evidence Convention's procedures depends on a balancing of the pertinent factors, such as the likelihood of success in obtaining the requested discovery through the Convention and the extent of the delay and expense involved in requiring resort to the Convention. See also

pages 10-12 and note 11, *supra*.[12] Moreover, it also may be appropriate for the trial court in a particular case to consider whether an apparent conflict of laws between state or federal discovery rules and a foreign blocking statute may be reconcilable without proceeding under the Evidence Convention. Here, for example, although the French blocking statute demonstrates that France's general policy is to require resort to the Convention, that policy may be subject to exceptions in individual cases. It may well be that, despite the broad language of the blocking statute, France might consider the discovery request in this case to be de minimis and would not oppose Club Med's compliance with that request. See Oxman, *supra*, 37 U. Miami L. Rev. at 782.

The courts below, however, do not appear to have engaged in the balancing of pertinent interests necessary to a proper comity analysis. In the absence of any express findings by the courts below on the comity issue, we are of the view that it would be inappropriate for this Court to undertake in the first instance to balance the relevant factors. Accordingly, we submit that the comity issue does not warrant review in the present posture of the case.[13] In the

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[12]The Evidence Convention, by its terms, applies only to civil and commercial litigation, and not to criminal or quasi-criminal investigations and enforcement proceedings conducted by governmental entities. Consequently, this case does not present any issue concerning the use of grand jury subpoenas or administrative summonses to obtain records located in foreign countries. See, *e.g.*, *Marc Rich & Co., A.G.* v. *United States*, 707 F.2d 663 (2d Cir. 1983), cert. denied, No. 82-2011 (June 27, 1983); *United States* v. *Vetco, Inc.*, *supra*; *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d 1384 (11th Cir. 1982), cert. denied, No. 82-1531 (June 13, 1983).

[13]For purposes of this brief, we have assumed that, because of the federal government's overriding interest in foreign relations, the validity of the state court's discovery order under principles of international comity is a question of federal common law and is ultimately reviewable in this Court. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 424-427 (1964); *Zschernig* v. *Miller*, 389 U.S. 429 (1968); Oxman, *supra*, 37 U. Miami L. Rev. at 789-790 n.151.

event that the Court were to deny review at this time, we believe it appropriate for appellant to seek reconsideration of the discovery order in the state courts (assuming state law otherwise permits) in light of the position that we have set forth in this brief.

CONCLUSION

The appeal should be dismissed and the alternative petition for a writ of certiorari should be denied.

Respectfully submitted.

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